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12

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 MICROSOFT CORPORATION, a
16 Washington corporation,

17 Plaintiff,

18 v.

19 INTRAX GROUP, INC., d/b/a,
20 SURPLUS COMPUTERS, a California
corporation; MICHAEL MAK, an
individual; and JOHN DOES 1-5,

21 Defendants.
22

No. 07-CV-01840-CW

JOINT CASE MANAGEMENT PLAN

23 The Plaintiff Microsoft Corporation, by and through its undersigned counsel of
24 record, and Defendants Intrax Group, Inc. d/b/a Surplus Computers and Michael Mak
25 (“Defendants”), by and through their undersigned counsel of record, having met and
26

1 conferred with respect to the matters set forth herein, hereby submit the following Joint
2 Case Management Statement.

3 1. **Jurisdiction and Service.**

4 This Court has subject matter jurisdiction over Microsoft's claims for copyright
5 infringement pursuant to 17 U.S.C. § 501 and 28 U.S.C. §§ 1331 and 1338(a), and venue is
6 proper in the Northern District of California pursuant to 28 U.S.C. §§ 1391(b) and 1400(a).
7 Defendants Intrax Group, Inc. d/b/a Surplus Computers and Michael Mak conduct business
8 and reside in the Northern District in Santa Clara County and were both served on April 24,
9 2007. All parties currently known to Microsoft have been served.

10 2. **Facts.**

11 a. **Factual Chronology:** Microsoft alleges as follows: On April 10, 2006, a
12 Microsoft investigator ordered what was advertised as one unit of Microsoft Office 2003
13 Standard, through www.surpluscomputers.com which, upon information and belief, is
14 Defendants' web site. Defendants contend that they advertised the software accurately as
15 Microsoft Office Student Media. Microsoft alleges that it examined the software and
16 determined that it infringed its copyrights because it was Microsoft Student Media software
17 ("Student Media"), which the Defendants were not authorized to use or distribute, and
18 which Microsoft believes was unlawfully imported to the United States and/or distributed in
19 interstate commerce by the John Doe Defendants. Subsequent purchases by Microsoft
20 investigators through the same web site on September 26, 2006 (one unit each of Microsoft
21 Windows XP Professional and Office 2003 Professional) and November 3, 2006 (one unit
22 Windows XP Professional) also proved to be infringing Student Media which had been
23 manufactured outside the United States and was not licensed for distribution in the United
24 States. On January 3, 2007, Microsoft delivered a letter by Federal Express to Defendants,
25 demanding that they cease and desist all infringing activity or risk legal action. Despite this
26 warning, it was determined through purchases by Microsoft investigators on January 11,

1 2007 (one unit each of Microsoft Windows XP Professional and Office 2003 Professional)
2 and March 6, 2007 (three units of Microsoft Office 2003 Professional) that Defendants
3 were continuing their distribution of Student Media through use of the web site
4 www.surpluscomputers.com, thereby infringing Microsoft's copyrights.

5 b. **Principal factual issues in dispute:** Microsoft contends that the Defendants
6 imported to the United States Microsoft software, including but not limited to, Windows XP
7 and Office 2003, and other software and components covered by Microsoft's registered
8 copyrights and bearing Microsoft's registered trademarks, and/or distributed in the United
9 States that software, without approval or authorization from Microsoft. Defendants have
10 denied these allegations.

11 3. **Legal Issues.**

12 (1) Whether Defendants infringed Microsoft's registered copyrights by importing
13 and/or distributing Microsoft software and components, without approval or authorization
14 from Microsoft, in violation of 17 U.S.C. §§ 501, 602; (2) whether Defendants' actions
15 were willful, as defined by 17 U.S.C. § 504(c)(2); and (3) the treatment of software under
16 the First Sale Doctrine.

17 4. **Motions.**

18 There are no previous or pending motions in this matter.

19 5. **Amendment of Pleadings.**

20 The parties do not currently expect to amend any parties, claims, or defenses, but
21 reserve their right to do so. The parties propose a deadline of February 5, 2008, for
22 amending the pleadings.

23 6. **Evidence Preservation.**

24 Microsoft requests that Defendants preserve any and all Microsoft Student Media
25 software in their possession; copies of all business records, invoices, billing statements,
26 orders and shipping records relating to their sales and purchases of any Microsoft software

1 products; records containing contact information for the companies and/or individuals from
2 whom they acquired any Microsoft software for resale, including addresses, telephone
3 numbers, email addresses and website addresses; and copies of any correspondence, email
4 or otherwise, relating to any Microsoft software or products they have acquired and/or
5 distributed.

6 Defendants ask that Microsoft preserve all documents relating to the subject
7 product, all documents relating to third parties that were in the chain of distribution of the
8 subject product from publisher to end user, and all documents relating to the production,
9 shipment, sale or licensing of the subject product. This includes all contracts (including but
10 not limited to licensing agreements), correspondence of any sort, phone records, shipping
11 records, and any other materials, including both hard copy and electronic copies.

12 Defendants also ask that Microsoft preserve all documents relating to the licensing or
13 distribution of Student Media, and academic version software, including all materials
14 provided to potential or actual distributors and all documents relating to Microsoft's
15 policies regarding sales and distribution of student media, academic version software, and
16 similar types of product sold by Microsoft.

17 **7. Disclosures.**

18 The parties have agreed to exchange their initial disclosures pursuant to the
19 requirements of Fed. R. Civ. P. 26(a) by August 17, 2007.

20 Plaintiff Microsoft will disclose (i) the names and relevant information regarding
21 known fact witnesses, (ii) evidence relevant to its case (copyright and trademark
22 registrations, copies of web pages from www.surpluscomputers.com, infringing Student
23 Media distributed by Defendants in Microsoft's possession, and the invoices for the
24 infringing Student Media acquired by Microsoft's investigators), and (iii) the applicable
25 damages and statutory references thereto.
26

1 Intrax will disclose the names and contact information for its suppliers of the subject
2 product.

3 8. **Discovery.**

4 Initial Disclosures, pursuant to Fed. R. Civ. P. 26(a)(1), will be exchanged by the
5 parties as noted in Paragraph 7 above. No other discovery has been conducted to date.

6 The parties do not currently anticipate the need for modifications to the limitations
7 on discovery imposed under the Federal Rules of Civil Procedure and the Local Civil Rules.
8 The parties, however, reserve their right to request modification or limitations on discovery
9 as this case proceeds.

10 The parties have agreed on a proposed discovery plan as set forth in their
11 accompanying Rule 26(f) Report of Meeting.

12 9. **Class Actions.**

13 Not applicable.

14 10. **Related Cases.**

15 Not applicable.

16 11. **Relief.**

17 a. **Damages:** Microsoft contends that it is entitled to recover actual damages,
18 which include its losses and all profits Defendants have made as a result of their wrongful
19 conduct, pursuant to 17 U.S.C. § 504(b). Alternatively, Microsoft contends that it is
20 entitled to statutory damages pursuant to 17 U.S.C. § 504(c). In addition, Microsoft
21 contends that because Defendants' infringement has been willful within the meaning of the
22 Copyright Act, the award of statutory damages should be enhanced pursuant to 17 U.S.C. §
23 504(c)(2).

24 b. **Bases for damage calculation:** Microsoft contends that actual damages
25 should be calculated based on the (i) lost sales and foregone profits to Microsoft caused by
26 Defendants' infringing conduct, (ii) internal costs to Microsoft of investigating Defendants'

1 infringing conduct, and (iii) profits directly attributable to Defendants' sales of Student
2 Media software. Statutory damages will be calculated based on the number of Microsoft
3 copyright infringements, with each copyright infringement assessed at no less than \$750
4 and no more than \$30,000, for non-willful infringements, and no more than \$150,000 each
5 for willful infringement.

6 c. **Accounting**: Microsoft will seek an order, pursuant to 17 U.S.C. § 504,
7 requiring Defendants to provide Microsoft a full and complete accounting of all profits
8 received by Defendants from their distribution or sale of infringing Microsoft software
9 and/or materials, and of any other amounts due and owing to Microsoft as a result of
10 Defendants' illegal activities.

11 d. **Injunctive Relief**: Microsoft will seek a preliminary and permanent
12 injunctive relief pursuant to 17 U.S.C. § 502 to prohibit Defendants from continuing their
13 infringing conduct.

14 e. **Impoundment Order**: Microsoft will seek an order, pursuant to 17 U.S.C.
15 §§ 503(a) and 509(a) and 28 U.S.C. § 1651(a), impounding all infringing Microsoft
16 software and/or materials, or any Microsoft documentation or packaging, and any related
17 items, including business records, that are in Defendants' possession or under their control,
18 and ordering the return, remedial destruction, or other appropriate disposition of all
19 impounded items.

20 f. **Constructive Trust**: Microsoft will seek an order, pursuant 17 U.S.C. §
21 504(b) declaring that Defendants hold in trust, as constructive trustees for the benefit of
22 Microsoft, all "profits" received by Defendants from their importation, distribution or sale
23 of infringing Microsoft software and/or materials, and issue temporary, preliminary and
24 permanent injunctive relief enjoining and restraining Defendants and their agents from
25 transferring, concealing or dissipating all profits and assets acquired in whole or in part with
26 those profits.

1 g. **Attorney's Fees/Costs:** Microsoft will also seek to recover its attorney's
2 fees and costs of suit pursuant to 17 U.S.C. § 505.

3 12. **Settlement and Alternative Dispute Resolution.**

4 The parties are currently exploring possible settlement options and have elected
5 Mediation (ADR L.R. 6) as their ADR process. The ADR plan was previously filed in
6 accordance with the Court's scheduling order. Microsoft will need to review Defendants'
7 initial disclosures, and may need to depose the individual defendants in order to be in a
8 position to negotiate a resolution.

9 13. **Consent to Magistrate Judge for All Purposes.**

10 The parties do not consent to having a magistrate judge conduct trial and enter
11 judgment. The parties will consent to a referral to a magistrate judge for general case
12 management and discovery issues.

13 14. **Other References.**

14 The case is not suitable for reference to binding arbitration, a special master, or the
15 Judicial Panel on Multidistrict Litigation.

16 15. **Narrowing of Issues.**

17 The parties agree that Microsoft holds valid copyright registrations in, *inter alia*, (a)
18 Microsoft Windows XP, (b) Microsoft Office 2003, (c) Microsoft Access 2003, (d)
19 Microsoft Excel 2003, (e) Microsoft Outlook 2003, (f) Microsoft PowerPoint 2003, and (g)
20 Microsoft Word 2003.

21 16. **Expedited Schedule.**

22 Not applicable.

23 17. **Scheduling.**

24 The parties propose the following case deadlines:

25 Plaintiff's expert disclosures: March 20, 2008

26 Defendant's expert disclosures: April 18, 2008

Discovery Cut-Off: July 18, 2008
Deadline to add additional parties: February 5, 2008
Dispositive Motions Deadline: August 14, 2008
Pre-Trial Conference: October 21, 2008
Trial Date: December 1, 2008

18. **Trial.**

The Defendants have requested a trial by jury. The parties expect that the trial will last five to ten days.

19. **Disclosure of Non-Party Interested Entities or Persons.**

The Plaintiff has filed the required Certification of Interested Entities or Persons under Civil Local Rule 3-16.

20. **Other Matters.**

Not applicable.

DATED this 20th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following parties and/or counsel of record, by the means designated below, this 20th day of July, 2007.

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